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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 769

THE GEMEX CORPORATION, a New Jersey corporation,
Petitioner,

vs.

A. C. BECKEN CO., an Illinois corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No.

THE GEMEX CORPORATION, a New Jersey corporation,
Petitioner,

vs.

A. C. BECKEN CO., an Illinois corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Petitioner, The Gemex Corporation, respectfully prays that a writ of certiorari issue to review a final judgment of the United States Court of Appeals for the Seventh Circuit reversing the judgment for Petitioner entered by the United States District Court for the Northern District of Illinois, Eastern Division, in an action under the Sherman Act entitled *A. C. Becken Co.* v. *The Gemex Corporation,* Civil Action 56 C 1962. The aforesaid judgment of the Court of Appeals set aside findings of fact and conclusions of law made by the District Court and directed

that Court to find the issues in favor of Respondent and against Petitioner, to assess damages, and to enter judgment that Respondent recover threefold the assessed damages plus costs of the suit, including reasonable attorneys' fees.

Opinions Below.

The Findings of Fact and Conclusions of Law of the District Court for the Northern District of Illinois, Eastern Division, (App. 134-136)[1] were not officially reported. The opinion of the Court of Appeals for the Seventh Circuit (Op. 1-8) is reported at 272 F. 2d 1.

Jurisdiction.

The judgment of the Court of Appeals for the Seventh Circuit was entered November 24, 1959, copy thereof being appended hereto (App. B, *infra*, 13a) and to the certified copy of the Appendix filed with this Petition. Timely petition of The Gemex Corporation for a rehearing filed December 9, 1959 was denied on December 30, 1959. (App. B, *infra*, 14a) Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. Whether a manufacturer, having pre-announced a price maintenance policy, may refuse to deal with distributors who do not observe the policy without violating Section 1 of the Sherman Act.

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[1] The record filed with this petition contains certified copies of the following and references are to pages of each document with identifying prefix letter:

Identifying prefix	Document	Date filed in Court of Appeals
App.	Appendix to Court of Appeals	7/13/59
Ex. Vol.	Exhibit Volume	7/13/59
Op.	Opinion of Court of Appeals (Certified with Appendix)	11/24/59

2. Whether, in the absence of any evidence of conspiracy, combination or agreement to restrain commerce, a court of review may summarily find by inference that unilateral refusals to sell constitute an illegal plan of doing business in violation of Section 1 of the Sherman Act.

3. Whether a distributor, in proof of an action under Section 1 of the Sherman Act, must show that unilateral refusals to sell have restrained competition, thereby causing general injury to the public at large and undue restraint on competitive conditions in the market.

4. Whether a court of review may set aside as clearly erroneous specific findings of fact relating to intent and motive to monopolize when such findings are based entirely on oral testimony.

5. Whether a court of review may set aside specific findings based on oral testimony and then make its own inferences from the testimony of record.

6. Whether a court of review may hold that findings based entirely on oral testimony that a manufacturer's refusal to sell was not for the purpose of creating a monopoly or restraining competition are clearly erroneous under Rule 52(a) Federal Rules of Civil Procedure.

7. Whether a court of review may summarily determine that an attempt to obtain compliance with minimum prices constitutes an illegal plan where actual agreements as to minimum prices would be valid under State Statutes.

Statutes and Federal Rules Involved.

Pertinent portions of the Sherman Act (15 U.S.C. Sections 1, 45 (a) (2)), Chapter 121½ Ill. Rev. Stats. Sec. 188, and Rule 52(a) of the Federal Rules of Civil Procedure (28 U.S.C.) are set forth in appendix A hereto.

Statement.

In this suit arising under Section 1 of the Sherman Act, Respondent, the A. C. Becken Co., sought treble damages from Petitioner, The Gemex Corporation, charging an attempt to engage in a wrongful and unlawful combination and conspiracy (App. 1). The basic facts are as follows:

The Respondent is a wholesale jewelry house which distributes various jewelry items to retail accounts throughout the country. Among some twenty thousand items distributed by Respondent were Gemex brand watchbands manufactured by the Petitioner. Petitioner is one of the smaller manufacturers in this portion of the jewelry industry, producing 10% or less of the national market and in direct competition with larger manufacturers who also supplied Respondent (App. 90).

Petitioner's sales to Respondent were on an open end account, there being no contract between the parties for purchase of given quantities or in fact for purchase of the complete line of Petitioner's products (App. 41).

As a manufacturer in a highly competitive field, Petitioner established a sales policy under which it chose not to use distributors who cut prices below those suggested by the manufacturers (App. 42, 116). In January 1956 Petitioner's Vice President and its Midwest sales representative advised Respondent concerning this practice (App. 23, 92). Although this general policy was announced well in advance to Respondent, contractual obligations were neither demanded by Petitioner nor incurred by Respondent.

Subsequent thereto, Petitioner's representatives ascertained that Respondent was selling the Gemex brand line

at discounts through its salesmen while maintaining the suggested list resale price through its catalogs (App. 85). and were also discounting the competitive lines (App. 91). Confronted with these practices, representatives of Petitioner conferred with the principals of Respondent on August 2, 1956, at which time the two respective parties, following rather heated exchanges, came to an impasse in their buyer-seller relationship (App. 22, 36, 42, 84, 87). As a result of this meeting Petitioner announced its decision under which it elected to no longer sell its watchband line to Respondent and subsequent thereto the business relationship between the two parties ceased (See No. 4 Finding of Fact by the District Court, App. 134-135).

Respondent continued thereafter to purchase the three or four other competitive watchband lines and the evidence showed that at no time subsequent to the cessation of relationship between the parties has Respondent been unable to purchase all of its requirements from other suppliers (App. 51).

Respondent very shortly thereafter brought this action, claiming as damages its loss of anticipated profits for the period intervening between the cessation of relations and the time of filing the action, with an additional period extending through January 31, 1961 (Ex. Vol. p. 5). For the most part the loss of anticipated profits relates to the deterioration in sales which Respondent had with a single account, namely Marshall Field & Co., of Chicago (App. 72-83; 94-112).

Following proofs which for the most part consisted of oral testimony, the District Court found that Petitioner had not combined, conspired or entered into any agreement of understanding with its wholesale distributors to maintain or fix resale prices (App. 135). The Court further

found that Petitioner's refusal to sell in the future to Respondent was not the result of any combination, or conspiracy and that Petitioner did not attempt to fix prices on products manufactured by its competitors (App. 136). In respect to any alleged effect upon the market or upon this Respondent, the District Court found that Petitioner's refusal to sell had no effect on prices charged to the public and that, further, Respondent had not been damaged as a result of such a refusal to sell, and additionally found that there was no evidence to support a finding that the public had in any way been injured by Petitioner's action in refusing to sell its products to Respondent (App. 135-136). As a result of these findings the District Court concluded that without evidence to support findings to the contrary, there was no violation of Sections 1 and 2 of the Sherman Act nor of Section 3 of the Clayton Act.

The Court of Appeals, on a review of the record, made separate findings directly opposite to those made by the District Court (App. B, 7a), holding that findings made by the District Court were clearly erroneous and that the District Court had erred in its conclusion. In its separate fact findings, the Court of Appeals found that the Petitioner's policy against selling its brand products to price cutters was in fact an illegal plan of doing business with the illegal purpose of attempting to destroy competition. The reviewing court further found that Respondent had suffered damage as a direct result of Petitioner's execution of its policy (App. B, 9a). The Court of Appeals recognized the right of a manufacturer to select its own customers[2] but concluded that the actions taken by Petitioner in connection with its refusal to sell to the Respondent implied an intent to destroy competition or create a monopoly.

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[2] Citing U. S. v. Colgate, 250 U.S. 300 (1919).

Reasons for Granting the Writ.

1. The decision of the Court of Appeals is in direct conflict with the doctrine announced in *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919), that a private manufacturer, in the absence of any intent to create or maintain a monopoly, has this qualified right to choose his customers and may refuse to deal with anyone for reasons sufficient to himself without violating the antitrust laws.[3] It is recognized that this right of a private trader to freely exercise its own independent discretion as to parties with whom it will deal is not absolute, but is conditioned on a negative finding of intent or motive to restrain competition. This motive may be implied from facts of a particular case such as where the refusal to deal is coupled with a combination or conspiracy among competitors as in a boycott situation. In other situations the intent to eliminate competition and to establish monopolistic control need not be inferred from the course of action but is apparent on its face.[4] In yet other cases the requisite intent to monopolize or restrain competition may be inferred from the unlawful effects which are found implanted on the market.[5]

Where there is a specific finding of intent to monopolize or restrain competition or where the restraint is illegal *per se*, a unilateral refusal to deal is not sanctioned by *Colgate*.[6]

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[3] See also the decisions of this Court in **United States v. A. Schrader's Son, Inc.**, 252 U.S. 85 (1920), and **Frey & Son v. Cudahy Packing Co.**, 256 U.S. 208 (1921).

[4] **Lorain Journal Co. v. United States**, 342 U.S. 143, 155 (1951).

[5] **U. S. v. Griffith**, 334 U.S. 100 (1948).

[6] **Times-Picayune v. U. S.**, 345 U.S. 594 (1953).

Additional elements not present in the *Colgate* case are used in the subsequent decisions to distinguish that case.[7]

The basic rule of law established under the *Colgate* case remains so long as a manufacturer does not exceed the limitations established therein. The decision of the Court of Appeals in the present case is in direct conflict with the long established *Colgate* doctrine.

The decision of the Court of Appeals is in direct conflict with decisions of Courts of other circuits. These Courts have been uniform in recognizing that refusal to deal is a qualified right subject to regulation by the antitrust laws.

The Court of Appeals for the Second Circuit has consistently held that this monopolistic intent is *not* shown by a mere refusal to sell because of price-cutting, without

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[7] In **Kiefer-Stewart Co. v. Seagram & Sons,** 340 U.S. 211 (1951) and **U.S. v. Socony-Vacuum Oil Co.,** 310 U.S. 150 (1940), this additional factor was an agreement or conspiracy between two competitors to force price maintenance upon their wholesale customers. In **Klor's v. Broadway-Hale Stores,** 359 U.S. 207 (1959), the same result was gained as to a single store by the use of a group boycott. Refusals to sell were condemned along with an overall plan of monopolization and price fixing involving both competitors and wholesalers in **American Tobacco Co. v. U. S.,** 328 U.S. 781 (1946). The collateral practice attacked in **F.T.C. v. Beechnut Packing Co.,** 257 U.S. 441 (1922), was an elaborate system of marking and tracing the manufacturer's goods to facilitate detection of the price cutters. The Court used the same approach in **U.S. v. Bausch & Lomb Optical Co.,** 321 U.S. 707 (1944), where the refusal to sell was not just to eliminate price cutters, but was to assure that the resale would be only to approved listed dealers who dealt solely in the manufacturer's goods and who were "ethical". Most recently in **U.S. v. Parke, Davis & Co.,** 28 L.W. 4150 (Feb. 29, 1960) it was the coercion used jointly on the wholesaler and retailer that provided the additional element.

collateral circumstances such as a conspiracy.* This view is well stated in *Adams-Mitchell Co.* v. *Cambridge Distributing Co.*, 2 Cir., 1951, 189 F. 2d 913, at 916:

> "It may be conceded that agreements made between sellers, or between a seller and his customers, to *fix* the resale price of goods moving in interstate commerce, so far as not exempted by the Miller-Tydings Amendment, 50 Stat. 693, violate the Sherman Act, *e.g.*, *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 71 S.Ct. 259. But the evidence here does not indicate such an illegal agreement. There are legitimate means of price maintenance in spite of the provisions of the Sherman Act; *e.g.*, *United States* v. *Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992. Such means include a refusal to sell in the future to those who had not maintained a suggested price."

The conflicting holdings in the Sixth and Seventh Circuits are *Crane Distributing Co.* v. *Glenmore Distilleries*, 6 Cir., 1959, 267 F. 2d 343, and the Court of Appeals' decision in the instant case, 7 Cir., 1959, 272 F. 2d 1.

2. The decision of the Court of Appeals is in conflict with numerous decisions of this Court, and the Courts of other Circuits, holding that an individual competitor in a private antitrust suit must either show that his loss resulted from a *per se* violation of the antitrust legislation, or demonstrate that his own damages were occasioned by an injury to competition. Although, as in the matter of intent, this public injury is readily inferred from *concerted*

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* **Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.**, 2 Cir. 1915, 227 Fed. 46; **Harriet Hubbard Ayer, Inc. v. F.T.C.**, 2 Cir., 1926, 15 F.2d 274; **Connecticut Importing Co. v. Frankfort Distilleries**, 2 Cir., 1939, 101 F.2d 79; **Adams-Mitchell Co. v. Cambridge Distributing Co.**, 2 Cir., 1951, 189 F.2d 913. See also **Technical Tape Corp. v. Minnesota Mining & Mfg. Co.**, 2 Cir., 1957, 247 F.2d 343.

refusals to deal or attempts to monopolize,[9] or other specific statutory infractions[10], this Court has continued to view antitrust legislation as designed primarily to protect markets from undue limitations on competitive conditions, and not as a safeguard against individual economic loss.[11] This view was also advanced by the Court of Appeals for the Fifth Circuit which stated in *Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 5 Cir., 1954, 214 F. 2d 891 (c. d. 348 U.S. 912 (1955)), at pages 893-94:

> "* * * The main purpose of those laws was to protect the public from monopolies and restraint of trade, and the private right of action for treble damages was incidental and subordinate to that main purpose. * * * "
>
> * * *
>
> "Public injury alone justifying the threefold increase in damages and being an indispensable constituent of a claim for violation of the antitrust laws, a general allegation of such injury is not sufficient. * * * ".

Refusals to deal by a manufacturer acting in concert with competitors or other business associates have a definite tendency to restrain trade and are considered violations *per se* of the Sherman Act. This is not so in the case of an individual manufacturer who refuses to sell to a single

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[9] **Klor's v. Broadway-Hale Stores**, 359 U.S. 207 (1959).

[10] **Emich Motors Corp. v. General Motors Corp.**, 340 U.S. 558 (1951).

[11] **Apex Hosiery v. Leader**, 310 U.S. 469 (1940); **Radovich v. National Football League**, 352 U.S. 445 (1957); **Klor's v. Broadway-Hale Stores, supra**; **U. S. v. Columbia Steel Co.**, 334 U.S. 495 (1948); **Times-Picayune Publishing Co. v. United States**, 345 U.S. 594 (1953).

customer.[12] To prove a violation under such circumstances requires a showing of purpose or intent to restrain competition or monopolize, and further, a demonstration that the customer's damages were occasioned by an injury to competition.

Because of the lack of concertedness or attempt to monopolize in Petitioner's refusal to deal, there could be no violation *per se* of Sections 1 or 2 of the Sherman Act in the present case. Therefore, it was incumbent upon the Respondent, as plaintiff, to demonstrate or imply some likelihood of public injury as well as its own private loss.

There was neither an allegation that the policy followed by Petitioner resulted in a public injury, nor was there a scintilla of evidence placed in this record to support such a charge. The Court of Appeals for the Seventh Circuit has consistently held that in these private treble damage actions the plaintiff in the absence of a *per se* violation must demonstrate that the alleged practices have caused general injury to the competitive process in such a way that the public at large suffers economic harm.[13]

The District Court made the specific finding 14 (App. 136) that there had been no evidence to demonstrate that the public was in any way injured by Petitioner's refusal to sell its watchbands to Respondent. Respondent at no time subsequent to Petitioner's refusal to sell has been

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[12] **Times-Picayune v. U.S., 345 U.S. 594 (1953); U. S. v. Columbia Steel Co., Supra; Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951): "[a manufacturer] acting individually perhaps might have refused to deal with petitioner or with any one or all of the * * * wholesalers. But the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers." (Emphasis added)**

[13] **Radiant Burners v. Peoples Gas, Light & Coke, 7 Cir., 1959, 273 F.2d 196.**

unable to purchase as much of the same type of merchandise from Petitioner's competitors as it desired. (App. 51) The Court of Appeals in summarily reversing the findings by the District Court failed entirely to consider Finding 14. It is submitted that such omission constituted error and is in conflict with the opinions of this Court in its construction of the Sherman Act.

3. The decision of the Court of Appeals setting aside the District Court's finding upon oral evidence of no intent to create a monopoly or destroy competition, amounts to such a departure from the proper and accepted course of judicial proceedings as to call for an exercise of this Court's supervisory power. It is in direct conflict with (a) prior decisions of this Court, (b) prior decisions of its own, and (c) decisions of the Courts of other circuits, in regard to scope of review and credence of oral testimony.

As discussed above, the determination and disposition of this suit depended upon a finding, either in fact or by implication, of a specific intent to monopolize. The District Court, however, found that such was not the purpose of Petitioner's refusal to continue selling. This determination was predicated entirely upon an accumulation or oral testimony by witnesses for both Petitioner and Respondent. Notwithstanding the nature of this finding and its peculiar dependency upon the credit given to the witnesses by those who see and hear them, the Court of Appeals set aside, as clearly erroneous, all findings inconsistent with its conclusions including those involving intent.

The failure of Respondent to prove before the District Court and place on the record any evidence as to the basic ingredient of motive and intent to monopolize cannot be corrected by new findings made in the reviewing Court.

Nor should that court resolve ambiguities, real or imagined, which appear in the evidence merely on the premise that the facts in the record were susceptible to a different construction. A choice between two permissible views of the weight of the evidence is not "clearly erroneous."[14]

In order to support its finding of implied intent to monopolize, the Court of Appeals attempts to further imply a conspiracy between Petitioner and two of its distributors in order to set up a *per se* violation. In its finding (App. B, 7a) the Court of Appeals stated:

> "* * * Tower also said that he had talked to Stein & Ellbogen Company and The Ball Company, competitors of plaintiff, and, when asked how he knew that they would uphold, or how they would stop doing this, and he said they had shook hands over it. And he said, "That is good enough for me"."

This quoted portion was one of the most hotly disputed fact issues before the trial court. The Court of Appeals states that "the evidence clearly establishes" the facts, portions of which are quoted here. The testimony to this as provided by Respondent's witnesses was denied by the witness for Petitioner (App. 88). The extensive memorandum of the meeting (Ex. Vol. p. 75), which was written and signed by the four representatives of Respondent, makes no mention of such agreements. Assuming that such was the fact, however, there is nothing shown but possible unilateral oral agreements with Petitioner's distributors to adhere to the suggested prices on its Gemex brand watchbands. Not even this portion of the finding by the Court of Appeals can supply the requisite indicia of

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[14] **United States v. Yellow Cab Co., 338 U.S. 338 (1949). See also United States v. Real Estate Boards, 339 U.S. 485 (1950).**

conspiracy, combination, or agreement to place this in a *per se* category.

This principle governing the scope of review has been followed in the decisions by courts of all other circuits, and in prior decisions by the Court of Appeals for the Seventh Circuit.[15] A corollary extending this principle is that a trial court need not accept even the uncontradicted testimony of a witness where the demeanor of the witness, his interest in the suit, or other circumstances do not allow conviction in the mind of the court.[16] A trial court need not accept one party's testimony as proof merely on the basis that such testimony is not directly and specifically contradicted, nor is a trial court bound to assume the credibility of interested witnesses where there are facts which might even indirectly give rise to inferences contradicting the witnesses. The trier of facts may reject entirely uncontradicted testimony which does not produce conviction in his mind, particularly when such testimony is from interested parties.

It is submitted that the Court of Appeals has not followed such principles governing its scope of review and by its separate fact finding, including improper inferences drawn from oral testimony, is a complete departure from proper procedure on review as governed by Rule 52(a) Federal Rules of Civil Procedure.

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[15] **Penn-Texas Corp. v. Morse**, 7 Cir., 1957, 242 F.2d 243; **Eicks v. Houghton**, 7 Cir., 1957, 248 F.2d 394; **Benrose Fabrics v. Rosensfein**, 7 Cir., 1950, 183 F.2d 355; **West v. Schwarz**, 7 Cir., 1950, 182 F.2d 721.

[16] **Sun Life Assurance Co. of Canada v. Stacks**, 7 Cir., 1951, 187 F.2d 17; **Winters v. Dallman**, 7 Cir., 1956, 238 F.2d 912; **Joseph v. Donover**, 9 Cir., 1958, 261 F.2d 812; **Panaview Door & Window Co. v. Reynolds Metals Co.**, 9 Cir., 1958, 255 F.2d 920.

As noted, Respondent based its case in the District Court on an alleged conspiracy to set prices and thereby establish a *per se* violation. The Court of Appeals, however, in its analogy to a "wrench—used to turn bolts and nuts" (App. B, 8a), characterizes Petitioner's policy as a type of forced agreement under which its customers would not sell below certain minimum prices. Minimum resale price contracts, either oral or written, covering brand name products such as the Gemex brand watchbands, are specifically exempted from the antitrust laws under the provisions of the McGuire Act, 15 U.S.C. 45(a) (2) and the Illinois Sales Act, Chapter 121½ Ill. Rev. Stats. Sec. 188. These statutes specifically provide that a producer of a brand name commodity such as involved in this case, when it is in fair and open competition with commodities of the general class such as in this case may contract with a buyer providing that the latter shall not resell the commodity except at price or prices stipulated by the vendor or producer. Admittedly there were no minimum price contracts between Petitioner and distributors but assuming there were, they would be so excluded. It is submitted that under these exemptions to the provisions of the antitrust statutes Petitioner's policy and its action in refusing to sell were proper.

Conclusion.

It is submitted that the resolution of this specific policy of refusing to sell to price cutters is so basic in commerce and industry as to make it a matter of such public interest to warrant the granting of this petition for writ of certiorari. The Court of Appeals for the Seventh Circuit has attempted to carve out an unrealistic exception to the *Colgate* Doctrine which is in no way warranted on the record in this case. It is submitted that for the foregoing reasons this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A.

15 U.S.C. Sec. 1

"§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. As amended July 7, 1955, c. 281, 69 Stat. 282."

15 U.S.C. § 45(a)(2)

"(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale."

Chapter 121½ Ill. Rev. Stats. Sec. 188

"No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the State of Illinois by reason of any of the following provisions which may be contained in such contract:

"(1) That the buyer will not resell such commodity except at the price stipulated by the vendor.

(2) That the producer or vendee of a commodity require upon the sale of such commodity to another, that such purchaser agree that he will not, in turn, resell except at the price stipulated by such producer or vendee."

Rule 52(a) Federal Rules of Civil Procedure (28 U.S.C.)

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, eff. March 19, 1948."

APPENDIX B.

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 12656 SEPTEMBER TERM, 1959 SEPTEMBER SESSION, 1959

A. C. BECKEN CO., an Illinois corporation,
Plaintiff-Appellant,
v.
THE GEMEX CORPORATION, a New Jersey corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 24, 1959

Before DUFFY, SCHNACKENBERG and PARKINSON,[1] *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Plaintiff, A. C. Becken Co., an Illinois corporation, appeals from an adverse judgment entered in the district court in plaintiff's action for treble damages brought under § 1 of the Sherman

[1] While Judge Parkinson participated in the hearing of oral arguments and a conference of the division judges above-named, he was not present at the time of, and did not participate in, the adoption of this opinion.

Act,[2] following a trial by the court without a jury. Defendant, The Gemex Corporation, a New Jersey corporation, is a manufacturer of watch bands, distributed by it nationally through wholesalers, including plaintiff (until August 2, 1956) and the latter's two principal competitors, The Ball Company and Stein and Ellbogen Company.

1. According to plaintiff's theory, defendant attempted to force plaintiff to enter into a price-fixing agreement for the establishment and maintenance between wholesalers of minimum resale prices on Gemex products and also on products competitive to the Gemex line. Plaintiff contends that defendant had already exacted such an agreement from plaintiff's competitors and threatened to drop plaintiff as a distributor unless it joined this price-fixing agreement. Plaintiff asserts that, when it refused to do so, defendant carried out its threat to "drop" plaintiff as a Gemex distributor, which resulted in losses to plaintiff for which it is entitled to treble damages.

§ 1 of the Sherman Act provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal[3] * * *."

The trial was on complaint[4] and answer. The court heard the evidence of the parties, made findings of fact

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[2] 15 U.S.C.A. §1.

[3] 15 U.S.C.A. §1.

[4] Plaintiff's complaint charged that defendant—

attempted to engage in a wrongful and unlawful combination and conspiracy,

(a) To prevent and restrict the sale and distribution of Gemex's products, by reason of its refusal, for the unlawful reason stated by Gemex as aforesaid, to sell its products to Becken;

(b) To prevent and restrict the sale and distribution of products manufactured and sold by Gemex's competitors;

and conclusions of law, and entered judgment, dismissing the action with prejudice. Finding 7 is as follows:

> Defendant's refusal to sell was not the result of any combination, conspiracy, or attempt to combine and conspire by defendant and anyone.

Here is defendant's contention:

> "The defendant, being a manufacturer, may announce to its distributors in advance the circumstances under which it will or will not sell to a given distributor. Such an announcement does not in any way amount to coercion and certainly, if done on a unilateral basis, does not constitute an attempt to conspire, whether in regard to fixing prices, maintaining quality, protecting trade names or trademarks, or any of the many aspects of commercial trade. A merchant or a manufacturer, absent any attempt to monopolize or restrain trade, may exercise discretion as to whom it will sell its products and may refuse to sell for reasons sufficient to itself."

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[1] (Continued)

(c) To, and did [sic], discriminate against a wholesale distributor, to-wit, Becken, who would not combine and conspire with Gemex to price competitors' lines as directed and dictated by Gemex;

(d) To force and compel Becken to enter into a contract or agreement providing for the establishment and maintenance between wholesalers of minimum resale prices on products competitive to the Gemex line; and

(e) To force and compel Becken to enter into a contract or agreement providing for the establishment and maintenance of minimum resale prices between persons, firms or corporations in competition with each other; and that such acts have unreasonably restrained, do unreasonably restrain, and will continue unreasonably to restrain trade and commerce in violation of the anti-trust laws of the United States of America above cited.

The evidence clearly establishes the following facts:

Tower, defendant's representative, on August 1, 1956, visited plaintiff's office and told its vice-president Bohlander that plaintiff would be expected to sell lines competitive to defendant's lines at manufacturer-suggested prices. On the following day, Swartman, defendant's sales manager, and Tower talked to president Clark and others, of plaintiff, in the latter's office. Tower stated that "it is the philosophy of our company" that to be a Gemex distributor, plaintiff would have to sell competing lines of watch bracelets at prices suggested by manufacturers. Tower also said that he had talked to Stein & Ellbogen Company and The Ball Company, competitors of plaintiff, and, when asked "how he knew that they would uphold, or how they would stop doing this, and he said they had shook hands over it. And he said, 'That is good enough for me'." After further discussion Bohlander suggested that

> "* * * if they would not allow us to sell the line through the salesman, that they at least allow us to show the line in our catalog."

He also stated that—

> "* * * at that point Mr. Tower stood up and he said, 'Well,' he said, 'we are at an impasse. This is it.'
>
> "And Mr. Swartman said, 'Well,' * * * 'it would seem to me that there is a moral obligation of some kind here, and that we ought to take back the sample lines,' * * *."

Defendant's answer admits that it advised plaintiff on August 2, 1956 that it would no longer sell its products to plaintiff.

The law recognizes that a manufacturer, in the battle for business, has a right to sell to whom he pleases. It follows that he has a right to stop dealing with a dealer because he thinks the dealer is acting unfairly in trying to undermine his trade. *United States* v. *Colgate & Co.*,

250 U.S. 300, 307. He is, however, limited to a legitimate use of this weapon. The right to stop dealing is neither absolute nor exempt from regulation. *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155; *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594. In the latter case the court said, at 625:

> "• • • If accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, even individual sellers' refusals to deal have transgressed the Act. • • •"

A wrench can be used to turn bolts and nuts. It can also be used to assault a person in a robbery. Like a wrench, a manufacturer's right to stop selling to a wholesaler can be used legitimately; but it *may not* be used to accomplish an unlawful purpose. In the case at bar, the clearly established facts show a plan of operation adopted by defendant, the essential purpose of which was to limit the sale of its products to wholesalers who would agree not to sell below prices stipulated by defendant. Such an agreement is in violation of § 1 of the Sherman Act. The established facts also show that the refusal to continue plaintiff as a wholesaler of defendant's products was solely because plaintiff would not sell those products according to defendant's existing illegal plan of doing business in violation of § 1. Plaintiff was not rejected as a customer by defendant because of any other reason. It follows that the facts alleged and established by the evidence state a cause of action under § 1 of that Act. Findings of fact by the district court, inconsistent with these views, are clearly erroneous, under rule 52 (b).[5]

In *Federal Trade Comm.* v. *Beech-Nut Packing Co.*, 257 U.S. 441, there was involved a system of merchandising which the said said, at 454,

> "• • • goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the *Colgate Case* was held to be within the legal right of the producer.

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[5] 28 U.S.C.A. rule 52 (b).

> "The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain. In its practical operation it necessarily constrains the trader, if he would have the products of the Beech-Nut Company, to maintain the prices 'suggested' by it. * * *"

From what we have said, it is obvious that the district court erred in entering its conclusion of law that no violation of the Sherman Act has been shown by plaintiff.

The district court should have found the issues in favor of plaintiff and this cause will be remanded so that such a finding may be entered, together with judgment accordingly.

2. Defendant relies upon the district court's finding 13, which reads:

> Plaintiff was not damaged as a result of defendant's refusal to sell watch bands to plaintiff subsequent to August 2, 1956.

Defendant asserts that the damages were so speculative in nature that it was impossible for the court to conclude that plaintiff had been damaged by any action taken by defendant.

However, we find that virtually uncontradicted evidence shows the following facts:

In the fall of 1954, defendant induced plaintiff to take over the Gemex inventory of a wholesaler who was going out of business and predicted that plaintiff's Gemex annual sales would be as much as $250,000. Plaintiff took on the line and commenced active promotion and sale, putting the line in its catalog which was distributed to thousands of retailers in the United States. Complete sample lines of Gemex brands were distributed by 16 salesmen to the retail trade throughout the middle west. The Marshall Field account was assigned specifically to one salesman

and, as a result, that account on August 2, 1956 was about one-third of the total volume of plaintiff's Gemex sales. When defendant withdrew its line, plaintiff's Field account dropped from $25,435.60 in the fiscal year ending January 31, 1956, to $1940.87, in the fiscal year next succeeding August 2, 1956. As a result of the cutoff, plaintiff lost its Christmas last-half business, and its profit on Gemex sales, instead of being an expected $6655 for the fiscal year ending January 31, 1957 (up from $4627.76 the year before), was only $1263.94, or a loss in the fiscal year during which the cutoff occurred of $4391.06.

In the light of 43 years' experience with promoting similar lines of merchandise, plaintiff, after promoting the Gemex watch bands during the first full fiscal year ending January 31, 1956, could reasonably expect a 50% increase in profits for the next year ending January 31, 1957, a 33% increase the following year, a 25% increase the next year and a 15% increase in each of the two succeeding years. Also sustained were losses ranging from out-of-pocket cash expended to losses in closing out the merchandise defendant had first agreed, and then later refused, to take back. These losses totaled $56,007.95. In addition, $780 was a salary outlay for promotion of defendant's line at Field's, the benefit of which was lost when the cutoff by defendant halted further sales of its merchandise there. Plaintiff concedes that about two-fifths of this item might be fairly deducted because of the sales made during the two years of this promotion activity before the date of the cutoff.

Total losses to plaintiff, thus shown, amount to $56,475.95.

We do not consider that the proof of damages offered by plaintiff was speculative in nature and that it is impossible to contend that plaintiff has been damaged by the action taken by defendant, as the latter contends. Rather, we think, that there was no speculation as to the fact of actual damage and that plaintiff's business was seriously curtailed by the cutoff by defendant. It is not

the law that the defendant who caused the damage can be permitted to escape liability because it is difficult for plaintiff to express in terms of dollars the damages it has suffered. *William H. Rankin Co.* v. *Associated Bill Posters*, 42 F.2d 152,* where, at 155, the court said:

> "* * * This evidence, while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted. It had to do with what was never actually earned because of the defendants' wrongdoing. The witness testified from his knowledge of the business history, made his calculations upon which appears to be a reasonable basis, and the defendants had ample opportunity by cross-examination or the offer of their own evidence on the subject to discredit him and show any fallacy in his reasoning or testimony. * * *"

The district court was led into error in finding as a fact and concluding as a matter of law that plaintiff was not damaged as a result of defendant's conduct. Damage was proved. Finding 13 is clearly erroneous.

While the evidence now in the record might be sufficient to justify a direction to the district court to compute therefrom plaintiff's actual damages sustained and make an assessment accordingly, we feel that the ends of justice would be better served if this cause be remanded for the purpose of considering the evidence already in the record on the subject of plaintiff's damages, as well as any proper evidence to be offered by defendant, and rebuttal evidence of plaintiff, on subject of plaintiff's damages, and fixing the proper amount of said damages. Such proceedings we now direct.

3. The judgment of the district court is therefore reversed and this cause is remanded to that court with instructions to (1) find the issues in favor of plaintiff and against defendant, (2) assess plaintiff's damages in

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* Cert. denied, 282 U.S. 864.

the manner and in accordance with the views herein expressed, and (3) enter judgment that plaintiff recover threefold the said damages assessed, and costs of suit, including a reasonable attorney's fee, which the district court shall fix. 15 U.S.C.A. § 15.

JUDGMENT, REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

Tuesday, November 24, 1959

Hon. F. Ryan Duffy, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. W. Lynn Parkinson, Circuit Judge

A. C. BECKEN CO., an Illinois corporation,
Plaintiff-Appellant,
No. 12656 vs.
THE GEMEX CORPORATION, a New Jersey corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and it is hereby, REVERSED, with costs, and that this cause be, and it is hereby, REMANDED to the said District Court with instructions to (1) find the issues in favor of plaintiff and against defendant, (2) assess plaintiff's damages in the manner and in accordance with the views expressed in the opinion of this Court filed this day, and (3) enter judgment that plaintiff recover threefold the said damages assessed, and costs of suit, including a reasonable attorney's fee, which the district court shall fix. 15 U.S.C.A. § 15.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

Wednesday, December 30, 1959

Hon. F. Ryan Duffy, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

A. C. BECKEN CO.,
Plaintiff-Appellant,

No. 12656 vs.

THE GEMEX CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS HEREBY ORDERED that the alternative petition of defendant-appellee for modification of the opinion and judgment of November 24, 1959, be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

Wednesday, December 30, 1959

Hon. John S. Hastings, Chief Judge
Hon. F. Ryan Duffy, Circuit Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

A. C. BECKEN CO.,
Plaintiff-Appellant,
No. 12656 vs.
THE GEMEX CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS HEREBY ORDERED that the petition by defendant-appellee for rehearing before the full court sitting en banc be, and the same is hereby, DENIED.